

² The Board notes that, following the January 5, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal.

ISSUE

The issue is whether appellant has met her burden of proof to establish entitlement to continuation of pay (COP).

FACTUAL HISTORY

On May 23, 2019 appellant, then a 61-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2018 she was working on a sorting machine while in the performance of duty when she rotated to sit down and experienced shooting pain down her back and into her right leg, aggravating a previously-accepted employment injury.³ On the reverse side of the claim form the employing establishment indicated that, following her original injury, she returned to work in a modified position. Appellant stopped work on December 9, 2018.

In a December 12, 2018 medical note, Dr. Christopher Mann, an osteopath specializing in occupational medicine, indicated that appellant fell at work on December 9, 2018 that caused her to aggravate her back injury. He indicated that she would be disabled from work from December 12 through 18, 2018.

In a December 18, 2018 diagnostic report, Dr. Albert Tesoriero, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's lumbar spine, revealing straightening of the lower lumbar lordosis, a mild spondylitic annular bulge at L2-3 and L3-4 as well as stenosis of the spinal canal at L4-5 and L5-S1.

In a December 27, 2018 report, Dr. Mann explained that he had been treating appellant since April 9, 2015 and that she experienced a material worsening of her back injury on December 10, 2018 where her right leg gave out and caused her to fall at work. Upon further medical observation, he found that she was temporarily disabled and she was held off of work from December 10, 2018 to January 23, 2019 for therapeutic treatment. Dr. Mann reviewed the December 18, 2018 lumbar spine MRI scan and explained that her diagnoses of lordosis, compressions of the spinal nerve roots and bilateral foraminal narrowing would have made her more susceptible to an aggravation of her injury with basic increases in her physical activity. He noted that this would correlate with the fact that she reported her leg suddenly "gave way" and caused her to fall. Dr. Mann further opined that appellant's fall to the floor would have most likely contributed to her current physical findings of impinged nerve roots causing numbness, tingling and poor standing or walking endurance. He diagnosed a lumbosacral intervertebral disc disorder with radiculopathy. Dr. Mann noted that the upgraded diagnosis had been submitted to OWCP's office since May 10, 2018 with no response to date. He concluded that she sustained a material worsening of her original April 8, 2015 employment injury.

³ Appellant initially filed a notice of recurrence (Form CA-2a) related to a previously accepted April 8, 2015 claim for thoracic or lumbosacral neuritis or radiculitis and a displacement of lumbar intervertebral disc without myelopathy under OWCP File No. xxxxxx732. On August 27, 2020 OWCP notified her that it had administratively converted her recurrence claim under OWCP File No. xxxxxx732 to a new traumatic injury claim occurring on December 9, 2018 under OWCP File No. xxxxxx231.

In a May 10, 2018 letter, Dr. Mann diagnosed lumbosacral neuritis and a lumbar disc displacement. He recommended that appellant's diagnosis be expanded to include lumbosacral intervertebral disc disorder with radiculopathy so that she could receive medical treatment necessary to treat her condition.

In a January 9, 2019 duty status report (Form CA-17), Dr. Mann diagnosed a lumbar disc displacement and checked a box marked "No" to advise that appellant was unable to return to work. In a medical note of even date, he indicated that she would be totally disabled from work January 9 through 23, 2019 due to her claimed December 9, 2018 employment injury.⁴

In a February 5, 2019 medical report, Dr. Patrick Stanton, Board-certified in pain medicine, evaluated appellant for pain in her lower back, buttocks and legs and identified the onset of her injury as April 8, 2015. He diagnosed lumbosacral radiculopathy and ordered a lumbosacral steroid injection.

In medical reports dated December 12, 2018 to February 18, 2019, Dr. Mann recounted the December 9, 2018 employment incident in which appellant reported that her right leg gave out and caused her to fall, aggravating the muscles in her lower back. He diagnosed lumbosacral region radiculopathy and lumbosacral region other intervertebral disc displacement.

In medical reports dated from February 22 to May 8, 2019, Dr. Stanton reviewed appellant's history of lower back pain radiating into her right lower extremity and diagnosed lumbosacral radiculopathy. He administered lumbar therapeutic epidural steroid installations to treat her lumbosacral radiculopathy.

In a May 10, 2019 letter, Dr. Mann indicated that OWCP had failed to acknowledge the receipt of medical evidence appellant submitted. He asserted that her claim for compensation began on December 10, 2018 when she was seen in his office on December 12, 2018 and was found to have experienced a material worsening of her April 8, 2015 employment injury under OWCP File No. xxxxxx732.

In attending physician's reports (Form CA-20) dated January 16 to September 4, 2019, Dr. Mann diagnosed lumbosacral intervertebral disc disorder, lumbar herniated disc and lumbar radiculopathy due to the April 8, 2015 employment injury. He checked a box marked "Yes" to indicate his opinion that her condition was caused or aggravated by the April 8, 2015 employment incident.

In a September 11, 2019 letter, Dr. Mann expressed his disagreement with OWCP's July 30, 2019 decision in OWCP File No. xxxxxx732. He explained that appellant's injury was a recurrence of her April 8, 2015 injury and should not have been categorized as a new injury.

In a March 23, 2020 report, Dr. Mann described his treatment history in relation to appellant's April 8, 2015 employment injury. He opined that she was totally disabled from full,

⁴ Dr. Mann indicated that appellant's employment injury occurred on November 9, 2018, however, this appears to be a typographical error.

unrestricted work duty as the result of her accepted conditions and that her injuries had continued to digress over the last three years.

By decision dated August 28, 2020, OWCP accepted appellant's traumatic injury claim for lumbosacral region radiculopathy and lumbosacral region other intervertebral disc displacement. By separate decision of even date, it denied her claim for COP, finding that she had not reported her injury on an OWCP-approved form within 30 days of the accepted December 9, 2018 employment injury. OWCP noted that the denial of COP did not affect her entitlement to other compensation benefits.

OWCP continued to receive evidence. Appellant submitted a May 22, 2019 physical therapy report from Landrie Johansen, a physical therapist.

In an August 31, 2020 Form CA-20, Dr. Mann diagnosed intervertebral disc displacement and radiculopathy and checked a box marked "Yes" to indicate that appellant's conditions were caused or aggravated by the December 9, 2018 employment injury.

On October 13, 2020 appellant requested reconsideration of OWCP's August 28, 2020 decision denying COP. She submitted arguments in support of her request, including the allegation that no one informed her of the documentation she needed to submit and that her attending physician submitted medical evidence supporting her claim.

OWCP also received physical therapy reports dated May 23 to July 1, 2019.

In an October 12, 2020 Form CA-20, Dr. Mann diagnosed intervertebral disc displacement and radiculopathy and checked a box marked "Yes" to indicate that appellant's conditions were caused or aggravated by the December 9, 2018 employment injury.

By decision dated January 5, 2021, OWCP denied modification of its August 28, 2020 decision.

LEGAL PRECEDENT

Section 8118(a) of FECA authorizes COP, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to a traumatic injury with his or her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.⁵ This latter section provides that written notice of injury shall be given within 30 days.⁶ The context of section 8122 makes clear that this means within 30 days of the injury.⁷

OWCP's regulations provide, in pertinent part, that to be eligible for COP, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the

⁵ *Supra* note 1 at § 8118(a).

⁶ *Id.* at § 8122(a)(2).

⁷ *E.M.*, Docket No. 20-0837 (issued January 27, 2021); *J.S.*, Docket No. 18-1086 (issued January 17, 2019); *Robert M. Kimzey*, 40 ECAB 762, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁸

The employee must provide a written report on a Form CA-1 to the employing establishment within 30 days of the injury.⁹ OWCP's procedures provide that another OWCP-approved form, such as CA-2, CA-2a, or CA-7 forms, which contain words of claim, can be used to satisfy timely filing requirements.¹⁰

The Board has held that section 8122(d)(3) of FECA,¹¹ which allows OWCP to excuse failure to comply with the time limitation provision for filing a claim for compensation because of exceptional circumstances, is not applicable to section 8118(a), which sets forth the filing requirements for COP. Thus, there is no provision in the law for excusing an employee's failure to file a claim within 30 days of the employment injury.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish entitlement to COP.

Appellant filed written notice of her traumatic injury on May 23, 2019, which was more than 30 days after her December 9, 2018 employment injury. Because she filed her claim on May 23, 2019, the Board finds that it was not filed within 30 days of the injury, as specified in sections 8118(a) and 8122(a)(2) of FECA. In her October 13, 2020 request for reconsideration, appellant reported that no one informed her of the documentation she needed to submit in support of her claim. However, there is no provision in FECA for excusing such a late filing.¹³ Additionally, appellant claimed that her physician submitted medical evidence relating to her claim. However, despite this, there remains no evidence of written notice on an OWCP-approved form prior to May 23, 2019.¹⁴ The Board, therefore finds that OWCP properly denied COP as appellant did not file her claim within the requisite 30 days from the date of injury.¹⁵

⁸ 20 C.F.R. § 10.205(a)(1-3); *see also J.M.*, Docket No. 09-1563 (issued February 26, 2010).

⁹ *Id.* at § 10.210(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.5 (June 2012).

¹¹ 5 U.S.C. § 8122(d)(3).

¹² *E.M.*, Docket No. 20-0837 (issued January 27, 2021); *Dodge Osborne*, 44 ECAB 849, 855 (1993); *William E. Ostertag*, 33 ECAB 1925 (1982).

¹³ *Id.*; *see also E.S.*, Docket No. 15-1800 (issued December 10, 2015).

¹⁴ *Supra* note 9 and 10.

¹⁵ 20 C.F.R. § 10.210(a); *J.S.*, Docket No. 18-1086 (issued January 17, 2019).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish entitlement to COP.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 31, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ Upon return of the case record, OWCP shall administratively combine the present claim file with OWCP File No. xxxxxx732.